

# What rights? Whose responsibilities?

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The Human Rights Act of 1998 needs strengthening,  
not qualifying.

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In March 2009 the Ministry of Justice produced a Green Paper, *Rights and Responsibilities: Developing Our Constitutional Framework*, which examined the arguments for a Bill of Rights and Responsibilities. Much delayed by ministers determined to prevent yet more challenges to the government in the courts, it was the subject of considerable internal wrangling and consequently largely vacuous. And yet the question of the balance between rights and responsibilities was spelled out quite simply by Tom Paine at the end of the eighteenth century:

While the Declaration of Rights was before the National Assembly, some of its members remarked, that if a Declaration of Rights was published, it should be accompanied by a Declaration of Duties. The observation discovered a mind that reflected, and it only erred by not reflecting far enough. A Declaration of Rights is, by reciprocity, a Declaration of Duties also. Whatever is my right as a man, is also the right of another, and it becomes my duty to guarantee as well as to possess (*Rights of Man*, OUP 1995 edition, p165).

Furthermore, Article 29 of the Universal Declaration of Human Rights, on which the European Convention on Human Rights (ECHR) is based, states that: 'In the exercise of his rights and freedoms everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for

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the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare of a democratic society'. And that, really, is that.

The debate that led up to the publication of the Green Paper, however, should be seen as part of the fraught history of the Human Rights Act 1998 (HRA). This Act, which finally imported the ECHR into British law, is a piece of legislation that has been under almost continuous attack since it was passed.

## Alien legal concepts?

Although the HRA was promoted under the slogan 'rights brought home', many of the rights contained within it had never before had a home in Britain, in the sense that they had never been protected by statute law. For example, until the incorporation of the ECHR there was no statutory right to freedom of expression, sentimental and rhetorical invocations of Britain as 'the home of free speech' notwithstanding. Much is traditionally made of Britain's role in drafting the ECHR in the first place, but as in the case of so many of this country's dealings with our continental neighbours, much of its input at that time was negative and obstructive. As Liberal Democrat peer Anthony Lester, Britain's leading human rights lawyer, has argued, the ECHR barely survived the strenuous efforts of the Attlee government to stifle or cripple it at birth. Thus, for example, the Chancellor, Lord Jowitt, stated that he was not 'prepared to encourage our European friends to jeopardise our whole system of law, which we have laboriously built up over the centuries, in favour of some half-baked scheme to be administered by some unknown court'; whilst the Attorney General, Sir Hartley Shawcross, thundered that 'any student of our legal institutions ... must recoil from this document with a feeling of horror'.<sup>1</sup> In short, many senior civil servants (at least one of whom had never even heard of human rights) and Labour politicians saw it as their bounden duty to protect the constitution, the common law system and the British Empire from 'subversive' European influences and the legal equivalent of fancy foreign food. As Lord Wakeham later put it, Britain at that time was quite simply 'unprepared to import alien legal concepts into its sovereign Parliamentary and judicial system'.

Thus when New Labour decided to import the ECHR into domestic law, it felt it must tread extremely carefully - as opposed to embarking upon a full-scale campaign of public education about human rights. And a key plank in this safety-first strategy

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was to ensure that 'rights talk' was always accompanied by 'responsibilities talk'. So, for example, in a 1996 speech Tony Blair argued: 'At the heart of everything that New Labour stands for is the theme of rights and responsibilities. For every right we enjoy, we owe responsibilities'. The strategy here involved differentiating New Labour from the selfish individualism and no-such-thing-as-society ethos of the Thatcher era. Thus at the 1997 Labour Party Conference Blair stated: 'We need to bring a change to the way we treat each other as citizens of our society. A decent society is not actually based on rights. It is based on duty. Our duty to each other'. And the following year he wrote: 'The politics of "us" rather than "me" demands an ethic of responsibility as well as rights'; and 'the rights we enjoy reflect the duties we owe: rights and opportunity without responsibility are engines of selfishness and greed'.<sup>2</sup> Meanwhile other early pronouncements on human rights suggest that 'responsibilities talk' was seen as a means of, in New Labour-speak, giving the British people 'ownership' of the human rights idea. Thus Jack Straw in a 1996 lecture said: 'Intellectually we all know that rights cannot exist without responsibilities, freedoms without obligations, liberties without duties. But it is crucially important that we spell this out ... Putting rights and responsibilities together brings our constitutional agenda down to earth, gives it real relevance to Britain's families and communities'.

So far, perhaps, so unexceptionable, if typically over-timid when dealing with hallowed verities. But once New Labour was in power, the approach shifted; rights and responsibilities were no longer interdependent - now the former were very much dependent on the latter. Thus Straw in the House of Commons, 21 October 1998: 'The truth is that rights have to be offset by responsibilities and obligations. There can and should be no rights without responsibilities and our responsibilities should precede our rights'. And similarly, in a 1999 speech, Home Office Minister Mike O'Brien, who subsequently became Chair of the government's Human Rights Task Force, stated: 'Rights flow from duties - not the other way'. And if all this sounds vaguely familiar, this may be because it carries heavy overtones of the American brand of communitarianism which so infatuated New Labour in the early days, whose guru Amitai Etzioni proposed 'a moratorium on the minting of most, if not all, new rights; re-establishing the link between rights and responsibilities; recognising that some responsibilities do not entail rights and, most carefully, adjusting some rights to the changed circumstances'.<sup>3</sup>

While we ponder just what 'adjusted' rights might be, we also need to remember

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that the New Labour government was to find many of its more authoritarian legislative instincts thwarted by the HRA and challenged under the Act in the courts. This was particularly the case in the wake of the anti-terrorism measures which it introduced in after both 9/11 and 7/7. Furious when some of these were challenged in parliament and, in particular, in the courts, Blair and successive home secretaries outdid each other in excoriating one of the few measures of which New Labour should have been proud. This, of course, was meat and drink to the illiberal press who loathe the HRA because (a) they fear that its privacy provisions may put a stop to their lucrative stock-in-trade of kiss 'n' tell stories; (b) it smacks of the hated 'Europe' and thus goes against every sinew of their Little Englander instincts; and (c) as dyed-in-the-wool reactionaries they are opposed point blank, as a matter of ideological principle, to the very notion of human rights.<sup>4</sup> Accused in particular of putting terrorist suspects' rights before the safety of the general public, and absolutely terrified of being painted as 'soft' on law-and-order issues, Blair and co immediately leapt onto the wrong side of an entirely specious argument, since the very first substantive right in the Convention is the right to life, which not only cannot be balanced against other rights but, moreover, carries with it the positive obligation to protect life. As the HRA's true begetter Anthony Lester angrily exclaimed in the *Guardian*: 'Having sown the wind of ignorant opposition, he and his government reap the whirlwind'(16.5.06). And when in July 2009 Lester resigned as Jack Straw's independent adviser on constitutional reform, he described his fifteen months working in the Ministry of Justice as a 'waste of effort', and delivered a particularly damning verdict not simply on the government's attitude to the HRA but its attitude to liberty and democracy in general:

The government damaged its creation by blaming the act for its own political mistakes. It never campaigned effectively to explain why human rights protection matters for everyone and not only for villains or cranks ... The idea of building on the Human Rights Act by creating a Great Charter of Rights and Freedoms was entirely beyond ministers. The sad reality is that the government is illiberal and often deeply reactionary. It lacks imagination, ambition and respect for personal liberty. It continues to make too many vastly complex laws instead of making existing laws work in practice.<sup>5</sup>

Inevitably, the growing row over the HRA attracted the opportunistic attentions

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of the Tories. The rabid right demanded that the next Tory government rip up the HRA, and even withdraw from the ECHR. (Pointless to argue that the latter would result in our leaving the EU - that's exactly what they want, as Melanie Phillips demands almost daily in her tirades against the HRA in the *Mail*.) Failing to grasp the elementary fact that human rights are either universal or they aren't rights at all, they called for a Bill of British Rights and Responsibilities. In the end, a form of sanity prevailed, and in a 2006 speech entitled 'Balancing freedom and security - a modern British Bill of Rights', David Cameron stated that:

I believe that the time has now come for a new solution that protects liberties in this country that is home-grown and sensitive to Britain's legal inheritance, that enables people to feel they have ownership of their rights ... The Conservative Party, under my leadership, is determined to provide a hard-nosed defence of security and freedom. And I believe that the right way to do that is through a modern British Bill of Rights that also balances rights with responsibilities.

In Cameron's view, a modern British Bill of Rights 'should protect the fundamental rights set out in the European Convention on Human Rights in clearer and more precise terms':

Greater clarity and precision would allow those rights to be enforced more easily and effectively in circumstances where they ought to be protected but it would become harder to extend them inappropriately as under the present law.

Seemingly pretty bland stuff by the overheated standards of mid-2006 - that is, until you come to the weasel word 'inappropriately'. Though Cameron did not specify precisely which rights he regarded as inappropriate, jumping forward a little to February 2009 we can note shadow home secretary Chris Grayling's contribution to this debate, when he called for 'fewer rights, more wrongs' - a particularly asinine soundbite, but one which nonetheless manages to be simultaneously vacuous and vicious.

### **Misunderstanding rights and responsibilities**

By now rights had become a major party political issue. One part of New

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Labour's response was to emphasise responsibilities as a necessary counterbalance to a 'commodified' conception of rights. Thus Straw argued in 2007 that in contemporary society, 'people appear more inclined to think of themselves and one another as customers rather than citizens'. One of the consequences was that rights have become commodified, and seen as 'yet more items to be "claimed"'. At the same time, 'some people resent the rights that are afforded to fellow humankind - we see this in the media uproar around human rights being a terrorists charter or there for the benefit of minorities alone'. In his view a British Bill of Rights and Responsibilities could help to combat this issue by helping to foster a stronger sense of citizenship and by 'establishing and articulating the balance between the rights we are all entitled to *and* the obligations we all owe to each other'. Thus, although with different emphases, both parties were now calling for changes in human rights law.

As the Green Paper uses similar language, Straw's views clearly represent current government thinking on the relationship between rights and responsibilities. However, the argument rests on a complete misapprehension of public understanding of the human rights issue. In general terms, the vast majority of people are actually in favour of human rights. Thus in research undertaken by Ipsos MORI for the Equality and Human Rights Commission in 2008, 84 per cent of people polled agreed that it is 'important to have a law that protects human rights in Britain'; 82 per cent agreed that 'there should be a set of human rights standards for how public services treat people'; and 81 per cent agreed with the statement: 'human rights are important for creating a fairer society in the UK'.<sup>6</sup> Similarly, research carried out for the Ministry of Justice found that:

The concept of having a law that deals with human rights in Britain is also overwhelmingly popular. It is only when it comes to the current application of the Human Rights Act that negative views are in the ascendant, with a net total of 43 per cent of the general public agreeing that too many people (mostly asylum seekers and other 'foreigners') take advantage of the Human Rights Act. Far fewer - a net total of 16 per cent - agree that the Human Rights Act has caused more problems than it has solved. In general we may conclude that most people support the concept of both human rights and the Human Rights Act, but see some problems with how the legislation currently operates.<sup>7</sup>

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In other words, people's worries about human rights, insofar as they have any, don't concern greedy and solipsistic individuals pursuing their own selfish ends to the detriment of society as a whole but - entirely predictably - members of out-groups that have been stigmatised by xenophobic and demagogic newspapers. In which case, the obvious solution, one would have thought, would be for government to do its utmost to expose and counter these press-generated misperceptions. Proposing new legislation to 'remedy' the HRA suggests that there is indeed something wrong with it, and thus only encourages further misrepresentation of its workings and consequences.

The Green Paper does explicitly state, in an apparent reversal of earlier pronouncements, that 'the Government is clear that fundamental rights cannot be legally contingent on the exercise of responsibilities'.<sup>8</sup> However, as so many of the self-same government's words and deeds give exactly the opposite impression, it's important to stress the words of the report by the Joint Committee on Human Rights following their enquiry into the need for a Bill of Rights in the UK (of which more below): 'human rights are rights which people enjoy by virtue of being human: they cannot be made contingent on the prior fulfilment of responsibilities'.<sup>9</sup> This was a point made a number of witnesses who gave evidence to the Committee. For example, Henry Porter stated:

I want to say something about the phrase 'rights and responsibilities' ... This springs from the telling belief among Ministers that rights are somehow in the gift of the government and that they are entitled to require people to sign up to a list of responsibilities in exchange. This is arrogant nonsense. The citizen's responsibilities are defined by common, civil and criminal law, and Ministers display a constitutional impertinence by suggesting otherwise (*Bill of Rights*, p69).

And Conor Gearty, Professor of Human Rights Law at the LSE pointed out that:

The notion of responsibility is already weaved into the Human Rights Act ... and requires no additional exposition. Indeed generalised qualifications to rights rooted in vague notions of 'responsibility' would be subversive of the structure of the Act. Such pseudo-contractual approaches to rights are battering rams with which to undermine the universality of rights while seeming to preserve their essence (*Bill of Rights*, p70).

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It was unsurprising, then, that the Committee concluded that:

Notwithstanding the Government's unequivocal acceptance that rights are not contingent on the performance of responsibilities, we are left with a distinct unease about the message which is sent by the Government's determination to link rights to responsibilities. We appreciate the importance of educating the public about the true nature of human rights legislation, and displacing myths about human rights law only benefiting the undeserving. However, it is hard to escape the sense that the language of responsibilities is a rhetoric which plays well with those in the media and the public at large who are hostile to the HRA and indeed to any form of legal protection for human rights (*Bill of Rights*, p71).

Even if one were to agree with highly dubious proposition that responsibilities and duties flow from rights, there would remain the question of who, in a highly diverse and pluralist society such as ours, could possibly have sufficient legitimacy to decide what are the duties from which rights flow. As Francesca Klug asked in a key work on the development of human rights legislation in the UK:

Is it to be God, Tony Blair, the Queen, religious leaders, judges, or Parliament (for which read the government of the day) whose set of 'fundamental duties' might change with each election if not each opinion poll? None of these have a remote chance of achieving sufficient legitimacy to successfully define a whole set of common responsibilities adhered to across classes, cultures and generations in a way that might conceivably be possible in a mono-cultural or mono-religious society.<sup>10</sup>

She concludes that it is hard to see how the government's approach to rights and responsibilities 'does not ultimately take us back in the direction of unquestioning obedience to god, family and the state which led to demands for inalienable rights in the first place' (p214).

When liberal democracies refer to statutory responsibilities they usually mean the responsibilities which the state owes to its citizens, and not the other way round. The latter is the province of rather different sorts of societies. Thus, for example, the

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chapter of the Constitution of the USSR devoted to 'the basic rights, freedoms and duties of citizens of the USSR' stated:

Citizens' exercise of their rights and freedoms is inseparable from the performance of their duties and obligations.

Citizens of the USSR are obliged to observe the Constitution of the USSR and Soviet laws, comply with the standards of socialist conduct, and uphold the honour and dignity of Soviet citizenship.

Amongst these duties is that of 'every able-bodied citizen of the USSR to work conscientiously in his chosen, socially useful occupation, and strictly to observe labour discipline. Evasion of socially useful work is incompatible with the principles of socialist society.

### **Economic and social rights**

Consideration of the responsibilities which the state owes to its citizens brings us on to the question of economic and social rights, which were the subject of a substantial part of the Joint Committee enquiry into the need for a Bill of Rights. The Committee argued that such a Bill would need to substantially strengthen the HRA rather than qualify it, for example through the inclusion of specific rights to health, education, administrative justice, access to personal and official information, an adequate standard of living and a clean and safe environment. The Committee argued that:

Rights such as the right to adequate healthcare, to education and to protection against the worst extremes of poverty touch the substance of people's everyday lives, and would help to correct the popular misconception that human rights are a charter for criminals and terrorists. In our view, the inclusion of such rights in a UK Bill of Rights would be far more effective in countering that misperception than the Government's attempt to link rights with responsibilities in the popular imagination (*Bill of Rights*, p56).

The Committee also maintained that a Bill of Rights should include 'strong legal

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protections for freedoms such as freedom of assembly, freedom of expression, freedom from unreasonable search and seizure, and freedom from unwarranted intrusions on privacy, all of which are essentially negative liberties from state interference'. For this reason, they believed that 'any bill of rights should be called a UK Bill of Rights and Freedoms' (*Bill of Rights*, p17). The Committee's report conclusively demonstrates that there is absolutely nothing to fear from a Bill of Rights - indeed, quite the contrary. It is only the apparent determination of the Tories and New Labour to saddle such a Bill with the baggage of responsibilities that is the problem.

However, the very last thing which this government - and certainly any future Tory government - wants are yet more justiciable rights, armed with which individuals can challenge government legislation or corporate activities in the courts. In this context it's particularly important to recall that when in 2000 the EU Charter of Fundamental Rights, one of whose cornerstones is social and economic rights, was being discussed, the government - in line with Britain's traditional role in European affairs - did its absolute utmost to wreck it. In particular, it and the Confederation of British Industry (CBI) were horrified that the Charter's references to the rights of workers to be consulted by their employers, the right to collective bargaining and the right to strike might interfere with Britain's anti-trade union laws, which entail that British workers have significantly less employment rights than any of their European counterparts. Britain's efforts meant that significant social and economic rights had been removed from the Charter by the time it was signed on 7 December 2000, and that it was not incorporated into the Treaty of Nice the following year. As the minister for Europe, Keith Vaz had proudly predicted the previous October, the watered-down Charter had no more legal force than the *Beano* or the *Sun*.

However, other European countries remained determined to give the Charter greater force, leading Jack Straw to tell the CBI on 18 May 2004 that the government put 'the interests of business at the heart of its negotiating position' with the EU and that 'we will insist that any new treaty - amongst other things - keeps the national veto for tax and social policy and that the charter of fundamental rights and responsibilities creates no new rights under national law, so as not to upset the balance of Britain's industrial relations policy'. Thus when it became clear that the Charter was to be included in the Lisbon Treaty, the government returned to its campaign of destruction with redoubled vigour, no doubt spurred on by CBI

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Director-General Richard Lambert's warning that, were the Charter to be included, the European Court of Justice could 'overrule carefully crafted rules [sic] on how strikes operate in the UK. Gradually, the UK's labour market flexibility would come under serious threat'. In the event, when the treaty was signed on 13 December 2007 (an event from which Gordon Brown notably absented himself) it contained what the government was proud to spin as a British 'opt-out' from the Charter, although in point of fact the 'opt-out' is a legally binding text which seeks to prevent the Charter from being interpreted in a way that creates additional rights to those already provided for in British law.

Such attitudes not only display a total abandonment of any form of socialism, but also place New Labour firmly beyond even the social democratic pale. Its ill-founded and authoritarian obsession with making rights dependent on responsibilities, coupled with its obsequiousness towards the CBI, has entirely blinded it to the fact that responsibilities are the corollary not of rights but of power - and that means both state and corporate power. In a democracy, those with power owe distinct obligations to those over whom they exercise power, be it through legislation or in the marketplace, and the justiciable social and economic rights which New Labour and its friends in big business are so keen to deny British citizens are the legal means of requiring the powerful to honour those obligations.

New Labour should be justly proud of introducing the Human Rights Act, but in many of its subsequent actions it has given the distinct impression of trying to disown it. However, the Act needs to be considerably developed and strengthened, not tinkered with and compromised in response to the all-too-predictable bile directed at it by the usual gang of xenophobes, authoritarians and constitutional atavists. The Joint Committee on Human Rights has shown the way ahead by actually developing the outline of a Bill of Rights and Freedoms (*Bill of Rights*, pp 105-113), and although we cannot realistically expect New Labour as currently constituted (nor the antediluvian wing of the Tory party) to follow the direction in which they point, anyone concerned not only with developing the UK's truncated human rights culture but also, more generally, renovating its distinctly archaic and incomplete democratic structures, needs to engage with this inspiring document. As Justice Albie Sachs told the Committee during its visit to South Africa, a country which does not include social and economic rights in its Bill of Rights is a country which has 'given up on aspiration' (*Bill of Rights*, p52).

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## Notes

1. The first quote is cited in A. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, Oxford University Press, p740; the second is cited in A. Lester, 'Fundamental Rights: the United Kingdom Isolated?', *Public Law*, 46, 1984, p52.
2. T. Blair, *The Third Way: New Politics for the New Century*, Fabian Society 1998, pp12, 4.
3. A. Etzioni, *The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda*, Crown 1993, p4.
4. For an account of episodes from the press campaign against the HRA, see J. Petley, 'Podsnappery: Or Why British Newspapers Support Fagging', *Ethical Space*, Vol. 3, nos 2-3, 2006.
5. <http://www.guardian.co.uk/commentisfree/2009/jul/27/constitutional-reform-illiberal-reactionary-labour>.
6. *Human Rights Enquiry*, Equality and Human Rights Commission, p31.
7. Ministry of Justice, *Human Rights Insight Project*, 2008, pp8-9.
8. *Rights and Responsibilities, Developing Our Constitutional Framework*, Ministry of Justice 2009, p18.
9. Joint Committee on Human Rights, *A Bill of Rights for the UK?*, July 2008 (hereafter *Bill of Rights*).
10. F. Klug, *Values for a Godless Age: the Story of the United Kingdom's New Bill of Rights*, Penguin 2000, p187.

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